



Date: July 9, 1998

Case No.: 97 INA 536

In the Matter of:

**CALIFORNIA ARCO,**  
Employer,

on behalf of

**KAMEL HUSSEIN AL QUDSI,**  
Alien

Appearance: David Neumeister, Esq., of Bakersfield, California

Before: Huddleston, Lawson, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

## **DECISION AND ORDER**

This case arose from a labor certification application that was filed on behalf of KAMEL HUSSEIN AL QUDSI ("Alien") by CALIFORNIA ARCO ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.<sup>1</sup>

Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements

---

<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

## STATEMENT OF THE CASE

On March 31, 1994, the Employer applied for alien labor certification on behalf of the Alien for the position of Manager for its Gas Station/Convenience Store. The duties of the job were described by the Employer as follows:

Manage gas station/convenience store. Plan, develop, and implement policies for operating station, such as hours of operation, workers required and duties, scope of operations, and prices for products and services. Hire and train workers, prepare work schedules, and assigns workers to specific duties. Reconcile cash with gasoline pump meter readings, sales slips, and credit card charges. Order, receive, and inventory gasoline, oil, and groceries. Operate cash register to itemize and total customer's purchases. Review price sheets to note price changes and sale items. Record prices, sub-total taxable items, and total purchases on cash register. Collect cash, check or charge payment and make change. Count money in cash drawer at beginning and end of work shift. Records daily transaction amounts from cash register to balance cash drawer.

AF 23.<sup>2</sup> On the basis of the Employer's description, the job was classified as "Manager, Retail Store" under DOT Occupational Code No. 185.167-046.<sup>3</sup> Although sixteen U.S. job applicants were referred for the job, none of them was hired. AF 22.

*The Alien.* The Alien graduated high school in Jordan. While living in the U. S. on a B-2 visa, the Alien was employed as manager of a gas station/convenience store from May 1990 to July 1993 and as shift manager in a gas station/convenience store in Bakersfield, California, from January 1994 to the date of application. According to the Alien's statement of his qualifications, the job duties in both of these jobs were virtually identical to the position Employer has offered in the instant application. AF 109-110.<sup>4</sup>

**Notice of Findings.** On December 14, 1995, the Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification. AF 17-21. The bases for the CO's finding were that the Employer failed to establish (1) that its failure to offer an alternative

---

<sup>2</sup>The wage offered was \$7.00 per hour from 8:00 AM to 5:00 PM, for a forty hour week, with no overtime. No academic education was required. *Id.*

<sup>3</sup>Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

<sup>4</sup> The CO did not provide information as to whether there was any connection between either his California or his Texas job and the Employer in this proceeding.

requirement to two years' experience in the Job Offered was not unduly restrictive and (2) that it rejected solely for reasons that were lawful and job related the U. S. workers its advertisement of the job had recruited.

(1) Citing 20 CFR § 656.21(b)(2)(i)(A), the CO said that, while the Employer required two years of experience as the manager of a combination convenience store-gas station, two years of experience as a store manager would be qualifying without the necessity that the retail store managed had been a combination convenience store/gas station. The issue was important because the Employer had rejected as unqualified U. S. job applicants who had two years of experience in retail store management but did not have experience in gas station management. The CO then said that there was no evidence of record that it is normal or customary to require two years of experience in the job of manager, gas station-convenience store as the sole minimum qualification for this occupation. Moreover, added the CO, the Alien, himself, was hired for his job in Houston with no previous experience whatsoever in managing either a retail store, a gas station, or a combination of both that is comparable to the occupation at issue. By way of rebuttal the Employer was directed to prove that the experience requirement was common to the occupation in the United States and was not restrictive or, in the alternative, to show that this qualification was a business necessity for the job it offered. Such proof, said the CO, should include evidence of the standard of required education that is normal to the industry in the U. S. and in the ARCO chain. (2) The CO cited 20 CFR § 656.21(b)(2)(ii) and 20 CFR § 656.21(b)(6) in finding that for reasons that were neither legal nor job-related the Employer rejected two U. S. workers, Mr. Vasquez and Mr. Adam. By way of rebuttal the Employer was directed to demonstrate that it had rejected each of these U. S. workers for reasons that were lawful and job related.

**Rebuttal.** The Employer's attorney wrote and filed its rebuttal on January 15, 1996. AF 13-16. Counsel assumed that this job could not be found in the DOT and argued that the two years' experience hiring criterion should be considered because the combination of business entities was common. He contended that the dominant portion of this managerial position related to the operation of the gas station, rather than to the convenience store. AF 14-15. Consequently, experience managing a gas station was necessary for this position's core duties. While the named U. S. workers did have retail store management experience, he added, this was not adequate to operate the Employer's combination store and self-service gas station. AF 16.

**Final Determination.** The CO's Final Determination of February 12, 1996, denied alien labor certification. AF 08-12. The CO rejected Employer's rebuttal arguments as to the finding that the experience requirement was restrictive, explaining that the Employer had not offered evidence that its experience criterion was customary or standard either in the U. S. or in the ARCO chain. The CO pointed out, moreover, that the Employer failed to explain its contention that an otherwise qualified manager who was newly hired was required without training to use expertise in filling station inventory control and general office operations. In addition, the Employer misstated Mr. Adam's qualifications, which indicated background in selling gasoline at retail. Also, the Employer failed to explain why it did not accept experience in managing a gas station as an alternative to managing a combined gas station and convenience store in

rejecting the applicants.

**Appeal.** Employer requested reconsideration by its letter of March 12, 1996, reiterating the contention that the business was primarily a gas station and repeating its previously stated arguments. In addition, the Employer noted its reasons for rejecting other U. S. applicants and added new evidence as to the customary practices of ARCO and other operators in the qualifications required of workers in this occupation. Citing **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*), the CO rejected the motion for reconsideration on grounds that reconsideration is limited to such issues as could not have been addressed in the rebuttal. Thereafter, the CO referred this matter for administrative-judicial review by the order of October 3, 1996.

## Discussion

As the arguments offered for reconsideration repeated the contentions of the rebuttal, the CO correctly rejected reconsideration under the holding in **Harry Tancredi**, *supra*. The new evidence that Employer first submitted with the motion for reconsideration and appeal is untimely and cannot be considered. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992.)

As the issue as to whether the Employer's job qualifications were restrictive under 20 CFR § 656.21(b)(2)(i)(A) grounded the CO's finding that U.S. workers were rejected for lawful job-related reasons, it is the primary consideration of this appeal. The factual theories presented by counsel in Employer's rebuttal are unsupported by evidence and cannot serve to prove material facts. **Yarn Development Co., Inc.**, 89 INA 178 (Apr. 19, 1991)(*en banc*).<sup>5</sup> It is fundamental to this application that an employer's use of unduly restrictive job requirements in the alien labor certification process is proscribed by 20 CFR § 656.21(b)(2) unless the requirements are adequately documented as arising from business necessity. In **Information Industries, Inc.**, 88 INA 082 (Feb. 9, 1989) (*en banc*), the Board explained that the Employer's hiring criteria must bear a reasonable relationship to the occupation in the context of the employer's business, and that such a job requirement must be essential to performing in a reasonable manner the job duties described by the employer.

The pivotal job requirement was the length of the Standard Vocational Preparation ("SVP") for the position offered, which in this case is defined by the identification of the occupation under the DOT. To meet Employer's requirement of two years' experience, the job must be at level seven in Appendix C, which requires "Over 2 years up to and including 4 years." If Employer's argument is factual, its description of the position at issue would combine the DOT description of the duties of the Manager of a Retail Store with those of the Manager of an Automobile Service Station in the DOT. First, although both positions concern

---

<sup>5</sup>To the same effect see also **Mr. and Mrs. Ails Ruin**, 90 INA 425(Dec. 9, 1991); **D & J Finishing Co., Inc.**, 90 INA 446 (Nov. 4, 1991); **Personnel Services, Inc.**, 90 INA 043 (Dec. 12, 1990); **DeSoto, Inc.**, 89 INA 165 (Jun. 8, 1990); **Dr Sayedur Rahman**, 88 INA 112 (Mar. 20, 1990).

the retail trade, the goods an Automobile Service Station Manager sells consist exclusively of equipment and supplies related to motor vehicles. The Retail Store Manager, on the other hand, customarily engages in one or more phases of general merchandising, and his title may be designated according to the type of goods sold or the business in which the worker is employed, including an auto supply house, *inter alia*.<sup>6</sup> As the Employer's own description of the job indicates that the worker will manage a business in retail trade that is configured to sell the merchandise of both a gas station and a convenience store, the Panel observes that the general managerial and merchandising duties of the two positions are similar, deviating only in sales functions related to management and operation of the gas pumps as equipment used in gas station sales.<sup>7</sup> The Employer's job duties explicitly ignore anything requiring the Manager to direct, coordinate, and participate in performing such customer service activities as pumping gasoline, checking engine oil, tires, battery, and washing windows and windshield, however. In the job at issue, no customer contact is involved except at the cash register. Consequently, the Employer's Manager would not engage in functions that are typical of the sales oriented work of a gas station that include informing the customer that the automobile oil is dirty or low, that the tires are worn, that the hoses or fanbelts are defective, or that evidence indicates battery defects.

---

6185.167-046 **MANAGER, RETAIL STORE** (retail trade) alternate titles: store manager. Manages retail store engaged in selling specific line of merchandise, such as groceries, meat, liquor, apparel, jewelry, or furniture; related lines of merchandise, such as radios, televisions, or household appliances; or general line of merchandise, performing following duties personally or supervising employees performing duties: Plans and prepares work schedules and assigns employees to specific duties. Formulates pricing policies on merchandise according to requirements for profitability of store operations. Coordinates sales promotion activities and prepares, or directs workers preparing, merchandise displays and advertising copy. Supervises employees engaged in sales work, taking of inventories, reconciling cash with sales receipts, keeping operating records, or preparing daily record of transactions for ACCOUNTANT (profess & kin.) 160.162-018, or performs work of subordinates, as needed. Orders merchandise or prepares requisitions to replenish merchandise on hand. Ensures compliance of employees with established security, sales, and record keeping procedures and practices. May answer customer's complaints or inquiries. May lock and secure store. May interview, hire, and train employees. May be designated according to specific line of merchandise sold, such as women's apparel or furniture; related lines of merchandise, such as camera and photographic supplies, or gifts, novelties, and souvenirs; type of business, such as mail order establishment or auto supply house; or general line of merchandise, such as sporting goods, drugs and sundries, or variety store. GOE: 11.11.05 STRENGTH: L GED: R4 M4 L4 SVP: 7 DLU: 81

7 185.167-014 **MANAGER, AUTOMOBILE SERVICE STATION** (retail trade) Manages automobile service station: Plans, develops, and implements policies for operating station, such as hours of operation, workers required and duties, scope of operations, and prices for products and services. Hires and trains workers, prepares work schedules, and assigns workers to specific duties, such as customer service, automobile maintenance, or repair work. Directs, coordinates, and participates in performing customer service activities, such as pumping gasoline, checking engine oil, tires, battery, and washing windows and windshield. Notifies customer when oil is dirty or low, tires are worn, hoses or fanbelts are defective, or evidence indicates battery defects, to promote sale of products and services, such as oil change and lubrication, tires, battery or other automotive accessories. Reconciles cash with gasoline pump meter readings, sales slips, and credit card charges. Orders, receives, and inventories gasoline, oil, automotive accessories and parts. May perform automotive maintenance and repair work, such as adjusting or relining brakes, motor tune-ups, valve grinding, and changing and repairing tires. May sell only gasoline and oil on self-service basis and be designated Manager, Self-Service Gasoline Station (retail trade). GOE: 11.11.05 STRENGTH: H GED: R4 M4 L4 SVP: 7 DLU: 81

It follows that the only part of the Employer's job description that clearly fits the job description of the Manager of an Automobile Service Station<sup>8</sup> is a slightly modified version of the duties that a Retail Store Manager and his subordinates would perform in the routine exchange of merchandise for money equivalent and the maintenance of inventories of merchandise and supplies in most forms of retail trade:

Reconcile cash with gasoline pump meter readings, sales slips, and credit card charges.  
Order, receive, and inventory gasoline, oil, and groceries... .

In short the only job functions of Employer's Manager that relate to sales of equipment and merchandise typical of a gas station is in reconciling the cash with gasoline pump meter readings, sales slips, and credit card charges.<sup>9</sup> For these reasons the Panel finds that the evidence of record supported the CO's finding that the job description in Employer's Form ETA 750 A fitted the DOT Occupation code number for a "Manager, Retail Store" under DOT Occupational Code No. 185.167-046

The Employer provided no credible facts or reasons that would support the inference that two years of experience in the work of any form of Automotive Service Station is necessary to learn how to perform these functions. Consequently, the CO reasonably inferred that the two years of experience a U. S. worker might acquire in the management of a retail business would suffice to provide the needed training for the core duties of this job. The U. S. job applicants referred included one or more workers who were able to learn to read the meter of a gasoline pump and to reconcile those readings with cash and business documents common to retail trade. As the Employer failed to establish that the special skill it cited could not be learned within a reasonable time, the evidence before the CO supported the subordinate finding that U. S. workers were available to perform this job at the time and place where it was advertised and offered under the Act and regulations. Consequently, the Employer failed to establish that its experience requirement of two years as the Manager of a Gas Station/Convenience Store bore a reasonable relationship to this occupation or that it was essential to performing in a reasonable manner the job duties described in its application for alien labor certification. **Aguarius Enterprises**, 87 INA 579 (Mar. 24, 1988).

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, it must comply with the Act and regulations when employer seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. The qualifications of a Retail Store Manager under DOT Occupational Code No. 185.167-046 met the Employer's job description in Item 13 of

---

<sup>8</sup>The DOT includes a Self-Service Gasoline Station Manager as part of its job description of the Manager of an Automobile Service Station, which has been compared with the duties of the Manager of a Retail Store.

<sup>9</sup> Moreover, this Manager would not otherwise promote sale of such automotive services as oil change and lubrication, or such products as tires, batteries and other automotive accessories, or the performance of such automotive maintenance and repair work as adjusting or relining brakes, motor tune-ups, valve grinding, and changing and repairing tires.

ETA Form 750 A for the reasons discussed above. Consequently, the experience and skills acquired as a Retail Store Manager were adequate for the job Employer described, and one or more U. S. job applicants were qualified for the position offered. Rejection of a U. S. worker who satisfies the minimum requirements specified in Employer's ETA 750A and advertisement is unlawful. **American Cafe**, 90 INA 026(Jan. 24, 1991). The regulations provide at 20 CFR § 656.24(b)(2)(ii) that an applicant who meets the minimum requirements specified by the employer's application for labor certification is considered qualified for the position. **The Worcester Co, Inc.**, 93 INA 270 (Dec. 2, 1994). Even if a U. S. applicant's resume does not meet all of the job requirements, if that resume shows a broad range of experience, education, and training, the reasonable possibility arises that the candidate is qualified. **Dearborn Public Schools**, 91 INA 222 (Dec. 7, 1993) (*en banc*); **Gorchev and Gorchev Design**, 89 INA 118(Nov. 29, 1990(*en banc*)).<sup>10</sup>

The resumes discussed in the NOF and Final Determination indicate that one or more of the U. S. job applicants for the position that this Employer offered was qualified and was available to be hired, even though the Employer rejected all of the U. S. workers referred. After examining the application, NOF, rebuttal, Final Determination and the appeal, the Panel agrees that the evidence of record supports the CO's finding that the Employer failed to engage in a good faith recruitment effort. **H. C. LaMarche Enterprises**, 87 INA 607(Oct. 27, 1988).

As the denial of certification is affirmed for the reasons discussed above, the following order will enter.

## Order

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

---

FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain

---

<sup>10</sup>Although the alien appears well qualified for the job and may even be better qualified for the position than any of the U.S. applicants, it is well settled that an employer cannot reject U.S. applicants on that basis. **K Super KQ 1540-A.M.**, 88-INA-397(Apr. 3, 1989)(*en banc*); **Morris Teitel**, 88-INA-9(Mar. 13, 1989)(*en banc*).

uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.